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NATIONAL ORIGIN DISCRIMINATION IN EMPLOYMENT IS UNLAWFUL

Employers' Obligations
Under Title VII of
The Civil Rights Act of 1964
And The 1986 Immigration Act

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INTRODUCTION

The Immigration Reform and Control Act of 1986 (IRCA) has raised new questions about employers' equal employment responsibilities in the areas of national origin and citizenship status. Both IRCA and Title VII prohibit national origin discrimination by employers.* However, the antidiscrimination provisions of the two laws are not identical and compliance with one does not necessarily constitute compliance with the other. In addition, overly restrictive hiring requirements adopted to avoid employment of unauthorized workers may violate the antidiscrimination provisions of one or both Acts. This booklet addresses the more common questions that have arisen following the enactment of IRCA.

The Law Under Title VII and IRCA

Title VII has always prohibited employment discrimination on the basis of national origin. Its major provisions are summarized below. IRCA has three major components: (1) employer sanctions for hiring unauthorized aliens** after November 6, 1986; (2) provisions for the legalization of certain unauthorized aliens; and (3) the antidiscrimination provisions. This booklet focuses on the antidiscrimination provisions of IRCA which are a supplement to Title VII protection. However, IRCA's general provisions also are summarized below since understanding and following these provisions are the surest safeguards against employment discrimination.

IRCA's Sanction Provisions

- Cover all employers
- Prohibit:
  - — Knowingly hiring an unauthorized alien after November 6, 1986;
  - — Continuing to employ an individual hired after November 6 1986, once you become aware of that individual's unauthorized status or once that individual's status changes from authorized to unauthorized alien; and

*Title VII and IRCA also cover employment agencies and labor unions; however, this booklet focuses on the responsibilities of employers.

**An "unauthorized alien" is defined as one who is neither: (1) a lawfully admitted permanent resident of the United States, nor (2) authorized by law or by the Attorney General to work in the United States.

— Failing to complete and maintain I–9 forms verifying the identity and authorization to work of each employee hired after November 6, 1986.

- Enforced by the Immigration and Naturalization Service, Department of Justice (INS).

What is not Covered by IRCA

- IRCA does not impose sanctions for retaining unauthorized aliens hired on or before November 6, 1986, and does not require verification of status for employees hired on or before November 6, 1986.

Legalization Provisions of IRCA

- Unauthorized aliens who could prove their continuous residence in the United States since January 1, 1982, were able to apply for temporary resident status and authorization to work prior to the May 4, 1988 deadline;
- There is a separate program for the legalization of agricultural workers.

Antidiscrimination Provisions of IRCA

- IRCA prohibits national origin discrimination by employers of 4–14 employees as well as other employers not covered by Title VII.
- IRCA prohibits employers of more than 3 employees from discriminating against U.S. citizens, nationals and intending citizens, on the basis of citizenship.
- Enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Department of Justice.

WHO IS COVERED?

TITLE VII	IRCA
Employers who have 15 or more employees for each working day in 20 or more calendar weeks in the current or preceding calendar year Employment agencies Labor unions	National origin antidiscrimination provisions cover employers (and other entities such as unions and employment agencies which recruit or refer for a fee), who have 4–14 employees or who are otherwise not covered by Title VII. Citizenship status antidiscrimination provisions cover employers of more than three employees.

WHAT IS COVERED?

Employment discrimination on the basis of national origin* in:	Antidiscrimination provisions cover employment discrimination on the basis of national origin or citizenship status in:
• Hiring	• Hiring
• Discharge	
• Recruitment	• Recruitment or referral for a fee
• Promotion	
• Salary and fringe benefits,** such as retirement plans and leave	
• Job assignments	• Discharge
• Other terms, conditions and privileges of employment	
• It is also unlawful for employers to retaliate against an employee asserting equal employment rights.	• It is also unlawful for employers to retaliate against an employee asserting equal employment rights.

*Although not discussed in this booklet, Title VII also prohibits employment discrimination on the bases of race, color, religion and sex.

**EEOC also enforces the Equal Pay Act, which makes it illegal to pay unequal wages (including fringe benefits), on the basis of sex, for substantially equal work performed under similar working conditions.

WHO IS PROTECTED?

TITLE VII	IRCA
All employees and job applicants of covered employers	***Citizenship status*** antidiscrimination provisions protect: U.S. citizens, U.S. nationals and intending citizens. In order to be considered an "intending citizen" a temporary or permanent resident alien or refugee or alien granted asyium must have completed a "Declaration of Intention" or "Declaration of Intending Citizen" form available from the INS, or OSC, prior to filing a discrimination charge, and have complied with the time-frames indicated in IRCA for pursuing naturalization. ***National origin*** antidiscrimination provisions protect U.S. citizens and U.S. nationals and authorized aliens, including intending citizens.

WHAT IS PROHIBITED?

Denial of equal employment opportunity because of:	Denial of equal employment opportunity because of:
An individual's (or his/her ancestor's) place of origin	An individual's (or his/her ancestor's) place of origin
Physical, cultural or linguistic characteristics of a particular national origin group	Physical, cultural or linguistic characteristics of a particular national origin group

WHAT IS PROHIBITED?—Continued

TITLE VII	IRCA
Selection criteria, such as height and weight, English language fluency requirements, or "speak English only" requirements which are intended to exclude national origin groups or have the effect of doing so and are not shown to be necessary for successful job performance or otherwise justified by business necessity	Selection criteria intended to exclude particular national origin groups
Harassment based on national origin, such as ethnic slurs	
Citizenship requirements* which have the purpose of discriminating on the basis of national origin or have the effect of doing so and are not justified by business necessity or required for national security reasons	The citizenship status of a U.S. citizen, national or a lawful, authorized alien who is an "intending citizen"
Retaliation for asserting equal employment rights	Retaliation for asserting equal employment rights

*Title VII does not explicitly forbid citizenship requirements but does indirectly prohibit them if they have the purpose or effect of discriminating because of national origin.

WHAT RELIEF IS AVAILABLE?	
TITLE VII	**IRCA**
Hiring	Hiring
Back pay	Back pay
Promotion	Reinstatement
Reinstatement	Administrative cease and desist orders
Other injunctive or equitable relief necessary to correct the unlawful practice.	An order to comply with the verification system
	Civil penalties of up to $1,000 for each discriminatee
	Civil penalties of up to $2,000 for each discriminatee if the employer was previously subject to such an order
Attorney's fees	Attorney's fees if the losing party's argument is without reasonable foundation in law and fact.

WHO ENFORCES THE ACT?	
The Equal Employment Opportunity Commission	The Office of Special Counsel for Immigration-Related Unfair Employment Practices, Department of Justice enforces the antidiscrimination provisions of IRCA.
The Department of Justice litigates Title VII cases with respect to state and local governments.	

Q. Is it possible to avoid both IRCA and Title VII problems by not hiring or by discharging anyone who looks or sounds foreign?

A. No. Failing or refusing to hire or discharging an individual because he or she looks or sounds foreign (or has a foreign sounding name) is national origin discrimination, which violates either IRCA or Title VII, depending on the size of the employer. IRCA requires the verification of all employees hired after November 6, 1986. Verifying only those who look or sound foreign violates IRCA's verification requirements and may lead to violations of IRCA's antidiscrimination requirements or Title VII.

Q. Can I hire only citizens if a federal government contract requires this?

A. Yes. The need to comply with federal contract requirements would constitute a business necessity under Title VII and is a specific exception to IRCA. However an employer may not impose a blanket citizenship requirement for all jobs in its workforce unless such a requirement can be justified for each job under this exception.* National security requirements restricting hiring to citizens only are exceptions to both Title VII and IRCA.

Q. Can I employ only U.S. citizens when there is no federal requirement?

A. In most cases no. IRCA prohibits discrimination against U.S. citizens, U.S. nationals** and intending citizens, on the basis of their citizenship status. Title VII prohibits citizenship requirements which have the purpose of discriminating on the basis of national origin, or have the effect of doing so but are not justified by business necessity.

IRCA contains a number of exceptions to its citizenship status antidiscrimination provisions. It allows a preference in hiring for a citizen over an equally qualified alien on an individual basis. In the event of an IRCA charge, the employer will be required to demonstrate that the applicants in question were equally qualified. IRCA also allows citizenship requirements which are required by Federal, State and local government contracts or those which the Attorney General determines to be essential for an employer to do business with an agency or

* 52 Fed. Reg. 37,403 (October 6, 1987).

** The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. The Immigration and Nationality Act, 8 U.S.C. §1101(a)(22). (e.g., inhabitants of the Swains Islands, are considered nationals).

department of the Federal, State or local government. IRCA also permits the use of citizenship requirements in order to comply with laws, regulations, or executive orders. Title VII, however, contains no citizenship preference provisions. Since IRCA's exception is permissive, it may not be a defense to a Title VII national origin charge. Also, since Title VII preempts state and local law, the need to comply with citizenship requirements of a state or local government contract probably would not constitute a business necessity in defense to a Title VII charge, even though such compliance would not violate IRCA.

Q. What documents must I accept as verification of an employee's identity and authorization to work?

A. The "Handbook for Employers," issued by INS, explains the I–9 verification form and lists the type and number of documents an employer must accept as verification. You, as an employer, must accept any of the documents as specified, and cannot require additional verification documents.

Q. Can I just ask for documents from those persons I suspect may be unauthorized aliens?

A. No. All employees hired after November 6, 1986, must be asked for documents verifying their identity and authorization to work. Asking only those suspected to be unauthorized aliens for documentation violates IRCA's verification requirements and is punishable by employer sanctions. You are also likely to violate IRCA and/or Title VII prohibitions against national origin discrimination, because suspicion of alienage often is based on how the individual looks or sounds or because (s)he has a "foreign sounding name."

Q. May I request verification documents before an applicant is actually hired?

A. Verification documents should not be requested prior to hire. A pre-employment request for verification documents increases the potential that information provided may be used in a discriminatory manner. For example, employers could utilize personal information contained on the I–9 form and documents establishing employment authorization and identity to discriminate against applicants due to age, national origin or citizenship. In addition, the practice of requesting information regarding age or citizenship status from applicants could inhibit individuals from applying for jobs with employers who make such requests, for fear that the information will be used for discriminatory purposes. Morever, INS regulations specify that: "An individual who *is hired* or is recruited or referred for a fee for employment must complete Section 1 'Employee Information and Verification' on the Form I–9 at the *time of hiring*; . . ." 52 Fed. Reg. 16,222 (May 1, 1987), 8 C.F.R. §274a.2(A)(b)(i)(A) (emphasis added).

Q. If I have a lengthy hiring process is there any way I can screen out applicants who ultimately will prove ineligible to work because they are unauthorized aliens?

A. An employer should be extremely cautious in attempting screening of this nature. However, a question, such as the following, if incorporated in a form given to all applicants, should not pose a problem under Title VII or IRCA: "Can you, after employment, submit verification of your legal right to work in the United States?" Again, such a question must be uniformly asked and carefully phrased, and you cannot require actual production until after hire. Where possible, inquiries of this nature should be avoided.

Q. Can I fire aliens who are eligible for legalization because they supplied false information on their application forms, such as the use of an alias or false social security numbers?

A. IRCA's legalization program recognizes that undocumented aliens may have used false employment information, particularly aliases and false social security numbers, in the past to hide their illegal status. IRCA requires aliens to reveal such information in order to qualify for the legalization program. Therefore, discharging individuals who are eligible for legalization solely for supplying such false information when hired may constitute a violation of IRCA's antidiscrimination provisions, particularly if the employer does not apply the falsification policy to all employees.

Q. Does IRCA restrict the employment of authorized aliens?

A. No. IRCA in no way restricts, penalizes or discourages the employment of authorized aliens.

Q. Must I terminate unauthorized aliens hired on or before November 6, 1986?

A. No. IRCA does not require you to terminate unauthorized aliens hired before the effective date of the Act, and imposes no sanctions for retaining them. However, such individuals remain subject to deportation by INS if they remain unauthorized.

Q. Are there other antidiscrimination laws addressing national origin or citizenship?

A. State and local equal employment laws and 42 U.S.C. §1981 may also apply in national origin or citizenship cases.

Q. Do unauthorized aliens have any rights under Title VII?

A. Yes. Title VII does not distinguish between authorized and unauthorized aliens.

Q. Can I violate Title VII if I comply with IRCA's provisions prohibiting the hiring of unauthorized aliens and requiring verification of employees' identity and work status?

A. No. Conscientiously following the procedures established to implement those provisions will help you avoid Title VII violations. If you are charged with discrimination and the alleged

discriminatory act was done in compliance with IRCA's sanction provisions, the need to comply with IRCA will constitute a defense.

Q. If I comply with IRCA's antidiscrimination provisions can I be sure I am in compliance with Title VII?

A. Not necessarily. Following some of the exceptions to the IRCA antidiscrimination provisions (such as the option to prefer a citizen over an equally qualified alien) may create a conflict with Title VII, if it has the purpose or effect of discriminating on the basis of national origin. Since most of these problematic exceptions are permissive you would be advised to avoid making exceptions unless truly necessary for the successful performance of your business.

Q. Does IRCA take precedence over Title VII?

A. No. IRCA's antidiscrimination provisions were designed to supplement pre-existing Title VII protection.

Q. What will happen if a charge of discrimination is filed against me with the Special Counsel?

A. Within 10 days after receiving a charge of discrimination, the Office of Special Counsel will notify you by certified mail that you are the subject of a charge. Once you have been notified the Office of Special Counsel will begin an investigation of the charge. You will be expected to make your records available to investigators during normal business hours. The Special Counsel has the power to subpoena evidence if necessary.

Within 120 days after receipt of a charge the Special Counsel will make a determination of whether to bring a complaint before an administrative law judge. If the Special Counsel determines that there is no reasonable cause to believe that the allegations of discrimination in the charge are true, both the respondent and the charging party will be notified.

If the charging party so desires he/she may then file a complaint directly with the administrative law judge, within 90 days of the 120 day period following the filing of a charge with the Office of Special Counsel.

Employers should be aware that any retaliation against a charging party for bringing a charge would constitute a violation of IRCA's antidiscrimination provisions.

Q. What will happen if a Title VII charge of discrimination is filed against me with the Equal Employment Opportunity Commission?

A. Within 10 days of the filing of a charge you will be served notice and a copy of the charge against you. An investigation will follow. You will be expected to provide the investigator access to evidence in your possession. The Commission has the power to subpoena evidence if necessary.

If the Commission determines that there is no cause to be-

lieve that the charge is true, notice of such a determination will be sent to all parties. With that notice of the final determination of the Commission, the charging party will receive notice of his/her right to sue in federal district court within 90 days. The charging party does have a right to request review of a no cause finding. If such a review is requested the Commission's no cause determination will not become final until confirmed by the review.

If there is reasonable cause to believe the charge is true, the Commission will attempt to reach a settlement of the charge with both parties. If an agreement is reached it will be reduced to writing, signed and sent to both parties.

If conciliation fails and no settlement is reached, the Commission or the charging party may bring an action against you in federal court.

You should be aware that retaliation against the charging party for bringing the charge is a violation of Title VII.

Q. Is it possible for both the EEOC and the Special Counsel to have jurisdiction over a charge of discrimination?

A. IRCA prohibits both the Special Counsel and EEOC from investigating a charge of national origin discrimination based on the same facts. However, it is possible that the Special Counsel could investigate a citizenship status charge and EEOC a national origin charge based on the same events since, depending on the discrimination alleged, different facts will be relevant. The Commission and the Special Counsel's office are developing procedures to deal with any instances of dual jurisdiction. However, in the unlikely event that you find you are being subjected to investigations by both agencies on a single incident, both agencies should be notified.

Q. Where can I obtain further information on my equal employment responsibilities under IRCA and Title VII?

A. Employers having further questions on Title VII and national origin discrimination may call the Equal Employment Opportunity Commission at 1-800-USA-EEOC (toll free) or (202) 663-4399 (TDD). You may also call or write your local EEOC office, which is listed in the telephone directory under U.S. Government. Employers having further questions concerning IRCA's antidiscrimination provisions, may call the Office of Special Counsel, Department of Justice at 1-800-255-7688 (toll free), (in the Washington D.C. area, (202) 653-8121), or for TDD numbers 1-800-237-2515 (toll free) (in the Washington, D.C. area, (202) 296-0168). INS provides recorded information 24 hours a day. Call 1-800-777-7700 (toll free), category number 1 for general information and then dial 5 for the antidiscrimination information. You may write to the Special Counsel at the following address: Office of Special Counsel for Immigration-Related Unfair Employment Practices, P.O. Box 65490, Washington, D.C. 20035-5490.

The information contained in this booklet is intended as a general overview and does not carry the force of a legal opinion.

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